O/JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RITA P. DINSMORE-THOMAS,

Plaintiff(s),

v.

AMERIPRISE FINANCIAL, INC.,

Defendant(s).

CASE NO. SACV 08-587 DOC (PLAx)

O R D E R GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Ameriprise Bank, FSB's, improperly named as Ameriprise Financial, Inc., ("Ameriprise" or "Defendant") Motion for Summary Judgment and Lifting the Temporary Restraining Order (the "Motion"). After considering the moving, opposing, and replying papers, as well as the parties' oral arguments, the Court hereby GRANTS Defendant's Motion.

I. Background

a. Defendant's Version of the Facts

On April 4, 2006, Plaintiff Rita P. Dinsmore-Thomas ("Thomas" or "Plaintiff") executed an American Express Home Equity Line of Credit Agreement ("Note") in the amount of $100,000.00. Under the Note, $100,000.00 was advanced to Plaintiff with monthly payments due on the loan balance and a March 4, 2026 maturity date. The Note was secured by a Deed of

Trust on the property located at 481 North Seranado Street, Orange, CA 92869, also dated April 4, 2006. The Deed of Trust was assigned from original lender American Express Bank to Defendant on August 20, 2007. Defendant contends that the last payment made by Thomas on the loan was on October 10, 2007, and was applied to the October 2007 payment.

Under the terms of the Note and pursuant to Thomas's default, Ameriprise terminated the account and accelerated repayment of the entire balance. The Deed of Trust provides for the right to foreclose on the property and the power of sale upon foreclosure. Defendant used Regional Trustee Services Corporation ("Regional") to foreclose on the Deed of Trust. A Notice of Default was recorded on February 1, 2008. Plaintiff then sent a debt verification request to Ameriprise on February 4, 2008. Defendant avers that "Plaintiff's request made unreasonable demands, not required of the defendant under the Fair Debt Collection Practices Act, including providing a 'wet ink signature note' and claiming that no debt would be owed if a response was not made within three days." Def.'s Mot. at 5-6. Plaintiff made the same requests on February 8, 2008, February 13, 2008, and February 19, 2008.

On February 28, 2008, Ameriprise responded to Thomas's letters by sending Thomas copies of the Note and Deed of Trust, a payment history on the account, a reinstatement letter showing the amount due to bring the loan current and a Demand/Payoff Statement if Thomas instead wished to pay off the loan in full. Defendant contends that Thomas still failed to cure the default.

On April 29, 2008, Plaintiff purportedly sent Ameriprise a cover letter with documents that she contended constituted a payoff of her loan and a copy of a letter to the IRS. The letter declared:

> Enclosed you will find a Money Orders [sic] for the above account that I have submitted to the Internal Revenue Service for payment against my Private Exemption account no. 434647170.
> When you, the Vendor, receive the 1040-V with your bill/statement/money order made payable to U.S. Treasury, transmit it to your senior accountant for processing.

> Please send me a statement of account showing a "0" balance as soon as you have made your adjustment. Also, enclosed please find Form W9, please provide your TIN number.

Attached to the above letter directed to Ameriprise was a letter also dated April 29, 2008, written directly to the IRS stating:

> The enclosed Money Orders and 2007 Federal Tax forms 1040-V, 1040, red 1099 O.I.D., red 1096 and 56 are filed to the best of my knowledge. The 1099 O.I.D. and 1040 form is to identify me as the sponsor for the credit that funded the Treasury Bill in the first place; proof that a federal tax debt exists; and proves pre-payment using my credit.

However, Defendant contends that in connection with the two above-quoted letters, as well as a series of attachments, no negotiable instrument was submitted that would function as a payoff of Thomas's loan.

In addition, on May 16, 2008, Thomas sent the trustee, Regional, a letter again contending that Thomas had paid of the loan with an attached document titled, "Private Bond Order for Payment - Non-Negotiable." The bond document lists its value at one-million dollars and states that the Hawaiian Treasury is surety of the bond.

Not considering the bond legitimate, Ameriprise continued with foreclosure, including recording a Notice of Trustee's Sale setting the foreclosure sale for May 28, 2008, at 2:00 p.m. On May 28, 2008, hours before the foreclosure sale, Thomas filed a Complaint and Ex Parte Application for a Temporary Restraining Order against Defendant Ameriprise in order to enjoin the foreclosure proceedings (the "TRO Application"). By her TRO Application, Thomas contended that Ameriprise had consistently failed to respond to her requests to verify and validate her debt. Thomas thus claimed that Ameriprise could not properly foreclose due to its failures to respond. In addition, Thomas claimed that she had twice tendered full payment of the loan. This Court granted the Temporary Restraining Order the same day, noting that it was "troubled by the fact that Thomas did not file suit until the day of the proposed foreclosure sale,

mere hours before the sale was to take place." TRO: Doc. No. 2, at 3. However, the Court noted that it was "equally troubled by Ameriprise' [sic] failure to properly respond to Thomas's request to verify the debt," citing to 15 U.S.C. § 1692g. *Id*. The Court also recognized that the foreclosure was particularly problematic if Thomas properly attempted to pay the debt. *Id*.

As Defendant avers, the Ameriprise loan was junior to a senior lien held by Central Mortgage Company. The senior lender proceeded to foreclose on its lien, for which Plaintiff also was in default, with a Trustee's Sale scheduled for December 3, 2008. On December 2, 2008, Plaintiff filed a second complaint against Central Mortgage Company and sought a temporary restraining order enjoining that sale. The Honorable Andrew J. Guilford denied the emergency request. Due to that case's relation to the instant case, that matter was transferred to this Court.

On December 3, 2008 (i.e. the date set for the foreclosure sale), Thomas filed a voluntary bankruptcy petition. However, the bankruptcy case was ultimately dismissed and closed due to Thomas's failure to file the necessary documentation. As a result, the property went to sale on January 20, 2009. Ameriprise purchased the property in order to protect its junior interest. Defendant Ameriprise further contends that it is the owner of the Note and can provide the original Note to the Court.

b. Plaintiff's Version of the Facts

Plaintiff's version of the facts and dispute with Ameriprise are rather difficult to follow. However, it appears that Plaintiff disputes that she ever received any written response from Ameriprise. She also continues to aver that she properly tendered payment and seems to indicate that Ameriprise never expressly told her that her payment was improper. She generally and rather vaguely continues to assert that she has been wronged by Defendant.

II. Legal Standard

Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Court must view the facts and draw inferences in the manner most favorable to the non-

moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993 (1962); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial, but it need not disprove the other party's case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548 (1986). When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out that the non-moving party has failed to present any genuine issue of material fact. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990).

Once the moving party meets its burden, the "an opposing party may not rely merely on allegations on denials or its own pleading; rather, its response must–by affidavits or as otherwise provided in this rule–set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party. Fed. R. Civ. P. 56(e)(2); *see also Anderson*, 477 U.S. at 248-49. Furthermore, a party cannot create a genuine issue of material fact simply by making assertions in its legal papers. There must be specific, admissible evidence identifying the basis for the dispute. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1980). The Supreme Court has held that "[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Anderson*, 477 U.S. at 252.

III. Discussion

a. Procedural Allegations

Plaintiff contends that Defendant's Motion is premature because discovery has yet to be completed in this matter. However, Plaintiff's contention is without merit. The discovery cut-off date was set for June 22, 2009, and no extensions have been requested or granted in this matter. Indeed, the motion cut-off was set for July 20, 2009, and Defendant properly filed and noticed the hearing on the instant Motion for that date (though the Court, on its own motion, moved the hearing date). As a result, the Court rejects any argument put forth by Plaintiff that a summary judgment motion is procedurally improper. In addition, a motion to dismiss pursuant

to Fed. R. Civ. P. 12(b)(6) is not currently before the Court, and Plaintiff cannot merely rely on the sufficiency of her pleadings at this stage in the litigation in response to Defendant's Motion. Plaintiff's reference to the Motion as either a motion to dismiss or motion for summary judgment is without merit.

b. Federal Fair Debt Collection Practices Act

1. Defendant properly verified the debt under the federal Fair Debt Collection Practices Act.

The federal Fair Debt Collection Practices Act ("FFDCPA), 15 U.S.C. § 1692g, provides for the validation of debts. 15 U.S.C. § 1692g(b) states, in pertinent part:

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

As Defendant points out, the FFDCPA does not explicitly define what constitutes proper

debt validation. However, the Ninth Circuit has articulated the baseline standard for a verification of a debt in *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th Cir. 2006). In that case, the Court adopted the standard as articulated by the Fourth Circuit, holding that "[a]t a minimum, 'verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed.'" *Id*. at 1173-74 (*quoting Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999)).

Plaintiff's initial request dated February 4, 2008, as well as the three that shortly followed, asked Defendant to (1) provide the name and address of the original creditor, (2) provide the name and address of the current creditor, and (3) provide a copy of the original contract as well as "return the original wet ink signature note." Kaufman Declaration, Exh. 2.

Defendant contends it complied with the request by sending to Plaintiff on February 28, 2008 (24 days later), a copy of the original Note and Deed of Trust that identify the original creditor, as well a payment history on the loan indicating all payments made by Plaintiff including her failures to pay. In addition, Defendant provided Plaintiff with a Reinstatement Quote identifying the amount Plaintiff had to pay in order to reinstate the loan. Furthermore, Defendant provided Thomas with a Payoff Statement that informed Plaintiff of what she would need to pay in order to pay off the loan in full. The documents further confirmed that the Plaintiff owed the debt and the amount due on the loan. In addition, the Note provided Plaintiff with the identification information for the original creditor, American Express Bank, FSB. While Defendant avers that the Reinstatement Quote and Payoff Statement provided Plaintiff with the address and telephone number of the current creditor, the Hjorten Declaration provides that Defendant is the current lender. As such, these documents do not appear to provide the address and telephone of the current lender but include contact information for the trusteee and loan servicer. Yet, Plaintiff clearly had the contact information for Defendant as she directed here inquiries to Defendant Ameriprise. In addition, the payment history identified Ameriprise as the lender. As such, these documents clearly meet the standard as articulated in *Clark*. In addition, the Court cannot see how Defendant is required to return the original note to Plaintiff in lieu of a copy of the note. As a result, Defendant likely complied with the verification

requirements under the act.

Plaintiff does not dispute that such documents allegedly provided by Defendant constitute an adequate verification of the debt under the FFDCPA. Instead, Plaintiff appears to contend that she never in fact received such a verification. However, her claim is rather conclusory and devoid of any factual support. *See Hansen v. U.S.*, 7 F.3d 137, 138 (9th Cir. 1993) ("When the nonmoving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact."). As a result, the Court finds that Plaintiff properly verified the debt. However, separate grounds exist for granting Defendant summary judgment on Plaintiff's FFDCPA claim as discussed below.

2. Defendant is not a debt collector subject to liability under the FFDCPA.

Despite the potential factual dispute regarding debt verification, the Court finds that summary judgment is warranted on the FFDCPA claim on other grounds. Liability under the federal Fair Debt Collection Practices Act ("FFDCPA"), 15 U.S.C. § 1692, *et seq.*, only applies to "debt collectors" engaged in "debt collection," as those terms are defined in the statute. *See* 15 U.S.C. § 1692(e) ("It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."). "The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S. C. § 1692a(6). By contrast, the FFDCPA defines a "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4). Similarly, excepted from the definition of a "debt collector" is "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor," 15 U.S.C. § 1692a(6)(A), or "any

person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity...concerns a debt which was not in default at the time it was obtained by such person," 15 U.S.C. § 1692a(6)(F)(iii). In addition, "[t]he legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditor's, a mortgage servicing company, *or an assignee of a debt, as long as the debt was not in default at the time it was assigned*." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (emphasis added).

Here, Defendant Ameriprise is in a position analogous to the original creditor and is not subject to the provisions of the statute. Indeed, the original lender assigned the debt to Ameriprise on August 20, 2007. And by the declaration of Melissa Hjorten, Defendent indeed represents that it is the current lender (present beneficiary) on the loan. Hjorten Declaration, at 2. Furthermore, Defendant contends that Thomas was not in default on the loan until two months later. Thomas does not dispute this fact and, indeed, seems to dispute that she was ever in default on the loan. As a result, Defendant Ameriprise, as an assignee of the debt that was not in default at the date of assignment, cannot constitute a "debt collector" under the FFDCPA. Thus, Ameriprise cannot be held liable for a violation of the FFDCPA.

c. Tender of Payment

By her complaint, Plaintiff asserts that she "has twice tendered payment in kind to defendant to no avail....Neither full tender was accredited to plaintiff's account [sic] Defendant failed to return receipt zeroing the account to the plaintiff." Complaint, ¶ 32.

By the instant Motion, Defendant contends that Plaintiff never properly tendered full payment of the loan. The Reinstatement Quote dated February 27, 2008, informed Plaintiff that she could reinstate her loan by March 20, 2008, through a check or money order in the amount of $4,486.59. However, rather than respond to the Reinstatement Quote, on April 29, 2008, Plaintiff purported to send Defendant a money order constituting a full payoff of her loan. By providing the Court with the documents allegedly submitted to it as a money order, Defendant contends that Plaintiff did not actually provide Defendant with a legitimate payoff. Indeed, by examining the submitted documents, the alleged money order is somewhat incomprehensible to

the Court. First of all, the Court notes that Plaintiff's cover letter identifying that Plaintiff has paid her account in full indicates that she has submitted a money order to the "Internal Revenue Service for payment against my Private Exemption account no. 434647170." In addition, she appears to have submitted a series of tax forms. Finally, on what appears to be one of her payment coupons for the loan, she has handwritten over the coupon, the phrase "Money Order", has written in the amount of $121,734.48, and directs Ameriprise Financial to pay the amount to the United States Treasury. By looking at one of the tax forms (most of which are blank and at most are partially filled out), it appears that Plaintiff may be claiming that she is owed a federal income tax credit in that same amount. Thus, she is alleging that her tax refund will constitute the payoff of her loan. Yet, as far as the Court can tell, an actual money order is not contained within these documents, nor is any other seemingly legitimate payment form. Indeed, the Court cannot see how or why Defendant should have relied on Plaintiff's bare assertion that she was going to receive a tax refund for over $120,000.00 dollars based on poorly filled out tax forms.

Furthermore, Plaintiff does not appear to dispute that the documents provided the Court are the full set of documents she sent to Defendant constituting her money order (i.e. she does not claim that they have misidentified the documents or omitted some of the documents). Indeed, she provides the exact same documents to the Court as attached to her affidavit in support of her opposition. In addition, she does not clearly respond to Defendant's argument that the documents do not constitute a legitimate money order. Instead, while she may assume that they do, she at most contends that Defendant failed to inform her that the payoff did not take place and at points seems to imply that Defendant improperly withheld her money (though such assertion seems without merit considering the problems identified with the alleged money order). However, Plaintiff does not provide the Court with any legal basis requiring Defendant to respond to her suggestion that such documents constituted a payoff of her loan. In addition, to the extent Defendant was under some kind of responsibility to inform Plaintiff that her alleged payoff would not be accepted, she has not identified a harm resulting from Defendant's failure. In other words, she has not claimed that she would have been able to properly tender payment in full but for Defendant's failure to inform her that they had not accepted her phantom money

order. Furthermore, when Defendant did not respond as she contends, she allegedly submitted another form of payment as discussed below, also undermining any argument that she was harmed by Defendant's failure to respond. Finally, the Court notes that in a similar California case in which the defendant lender foreclosed on plaintiff borrowers home despite plaintiffs' contention that they had tendered payment in full, the California Court of Appeal held that foreclosure was proper where plaintiffs proffered tender with a worthless bond, despite the fact that the defendant lender twice failed to respond to the tender. *McElroy v. Chase Manhattan Mortg. Corp.*, 134 Cal. App. 4th 388, 390, 394 (2005). Thus, failure to respond to worthless tenders does not appear to make an otherwise legitimate foreclosure instead wrongful.

Indeed, in *McElroy*, plaintiff borrowers contended that under California Civil Code § 1501 and California Code of Civil Procedure § 2076, the defendant lender's "alleged failure to respond [to the tender] waived any objections to their tender of payment thereby discharging the debt by operation of law." Id. at 393. However, the *McElroy* Court noted that "'[t]he purpose of these two code sections is to allow a debtor who is willing and able to pay his debt to know what his creditor demands so that the debtor may if he wishes, make a conforming tender.'" *Id*. at 394 (*quoting Noyes v. Habitation Resources, Inc.*, 49 Cal. App. 3d 910, 914 (1975)). As such, "'[t]hese statutory provisions do not apply where, as here, the amount of the creditor's demand is known to the debtor and the amount of the tender is wholly insufficient." *Id*. (*quoting Gaffney v. Downey Savings & Loan Assn.*, 200 Cal. App. 3d 1154, 1166 (1988). In the instant case, Plaintiff makes no assertion that she did not know the amount demanded by the creditor. Indeed, the Notice of Default indicated the amount she was in arrears (and the Notice of Trustee's Sale, recorded prior to Plaintiff's alleged second tender, also listed the full amount due), the alleged money order was written over a payment coupon indicating the account balance, Defendant provided her with a Reinstatement quote and Payoff letter, and Plaintiff's verification letter did not request the amount due on the loan (implying that the amount due was likely already known by Plaintiff). Thus, with no affirmative evidence that Plaintiff was unaware of the amount due on her note, the Court cannot find that Defendant's alleged failure to respond to worthless tender operates as a discharge of the debt.

As to Plaintiff's second attempt to pay her loan in full through a "Private Bond Order for Payment - Non-Negotiable" ("Private Bond") on May 16, 2008, Defendant contends that the bond by its own terms cannot be used to pay off the debt because it indicates that it is not a negotiable instrument. Second, Defendant argues that the document is clearly a fictitious instrument. Indeed, Defendant cites to a number of state cases in which mortgagors attempted to pay off loans with bonds deemed worthless by the Court. *See, e.g., McElroy, supra*; *see also, U.S. Bank v. Phillips*, 366 Ill. App. 3d 593 (2006).

The Private Bond, claimed to be worth one-million dollars, appears to have been posted by an individual named Ernest Walker Bey through "The Bey Family Irrevocable Trust" and purports to be secured by the Hawaiian Treasury. By its terms, it states that the "Comptroller of the Currency, (DAGS), The Hawaiian Treasury- Russ K. Saito is directed to issue money on account via this bond order to REGIONAL TRUSTEE SERVICES CORPORATION (or Lender) for satisfaction of Loan Account...and to close/terminate accounts as paid, in accordance to and per Sections 75; 91 & 103 of the Organic Act April 30, 1900," and otherwise identifies the Hawaiian Treasury as the surety of the bond. However, the Organic Act of April 30, 1900, is a federal act that provided a government for the (then) Territory of Hawaii (the "Organic Act"), 56 Cong. Ch. 339, April 30, 1900, 31 stat. 141. Sections 75, 91, 81, and 103 of the Organic Act in no way purport to impose an obligation on the Hawaiian Treasury to honor private bonds. In addition, none of the other cited authorities purporting to identify the source of the Hawaiian Treasury's obligation to honor the instant bond actually stand for such a proposition (*See, e.g.*, 18 U.S.C. §§ 241 and 242 and the Uniform Commercial Code §§ 1-101 and 10-104). As stated in *McElroy*, "[s]ince the Bill purports to identify the source of the Secretary of the Treasury's obligation to honor the Bill, and the cited source does not establish an obligation, we unhesitatingly conclude the Bill is a worthless piece of paper, consisting of nothing more than a string of words that sound as though they belong in a legal document, but which, in reality, are incomprehensible, signifying nothing." *McElroy*, 134 Cal. App. 4th at 393. As such, the Private Bond, as a worthless piece of paper, cannot constitute a legitimate tender.

In her Statement of Disputed Fact, Plaintiff argues that "repayment need only be made in

equivalent kind: [a] negotiable instrument representing credit." Pl.'s Statement of Disputed Facts at 9. Plaintiff seems to concede that a negotiable instrument is required to pay off the loan. And, as Defendant points out, the bond, by its own terms, is non-negotiable. However, the primary concern for the Court is the seemingly fictitious nature of the bond. Plaintiff provides no argument that the bond is legitimate and provides the same bond document to the Court as does Defendant. As discussed above, the Private Bond, on its face, clearly is not insured by the Hawaiian Treasury. Thus, Defendant engaged in no wrongdoing by rejecting the worthless Private Bond.

As a result, because Plaintiff failed to tender proper payment to Defendant, Plaintiff's allegation that the foreclosure was wrongful on such grounds is without merit.

d. Vexatious Litigant

By its Motion, Defendant also requests that this Court deem Plaintiff a vexations litigant pursuant to California Code of Civil Procedure § 391, *et seq*. Cal. Code of Civ. P. § 391(b) defines "vexatious litigant" and includes as one definition, an individual who, "[i]n any litigation while acting in propia persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous solely intended to cause unnecessary delay. Cal. Code of Civ. P. § 391(b)(3). Defendant contends that Plaintiff used the Court to obtain emergency relief under false pretenses, has instituted two clearly unmeritorious actions related to the same property, improperly filed a bankruptcy petition, and has otherwise engaged in improper behavior. It appears that by deeming Plaintiff a vexatious litigant, Defendant seeks to have this Court require Plaintiff to obtain "leave of court before filing additional actions on the property subject to this action." Def.'s Mot. at 17. While Defendant does not provide the Court with the basis for so doing, Cal. Code of Civ. P. 391.7(a) allows the Court to "enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propia persona without first obtaining leave of the court where the litigation is proposed to be filed," and indicates that "[d]isobedience of the order by a vexatious litigant may be punished as a contempt of court."

While the Court is seriously concerned by Plaintiff's conduct, as alleged by Defendant,

the extreme remedy preventing her from pursuing even unrelated litigation without leave of court is not yet warranted. While the Court recognizes Defendant's concerns, the Court must also be sensitive to the Plaintiff's pro se status and is not yet ready to brand her a vexatious litigant.

e. Additional Allegations

As Defendant notes, the facts as alleged in Plaintiff's complaint primarily speak to three major issues: (1) whether Defendant failed to verify the debt; (2) whether Plaintiff paid off her debt; and (3) whether Defendant had the right to foreclose on the property. However, while not clearly alleging additional facts, Plaintiff makes cursory references to other legal issues throughout her complaint. As a result, the Court addresses those additional allegations here.

To begin, Plaintiff repeatedly states that the primary issue in this case is "who owns the note and can produce the original note." Pl.'s Statement of Disputed Facts at 7. However, Plaintiff's point is problematic for two reasons. First, Defendant has provided the Court with its Corporate Assignment of Deed of Trust executed by the original lender. *See* Kilgore Declaration, Exh. 3. Thus, there seems to be no factual dispute that Ameriprise owns the loan. Second, Plaintiff's claim that Defendant must produce the original note is based on her implicit claim that the original note is necessary for foreclosure. However, nothing in the statutory framework governing non-judicial foreclosure contains a requirement that the trustee, mortgagee, beneficiary, or any of their authorized agents produce the original note to initiate the foreclosure proceedings. *See* Cal. Civ. Code § 2924; *San Diego Home Solutions, Inc. v. Reconstruct Co.*, No. 08cv19701(AJB), 2008 WL 5209972, *2 (S.D. Cal. Dec. 10, 2008).

In addition, Plaintiff cursorily refers to the California Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code § 1788, et seq. However, Plaintiff fails to allege any conduct by Defendant violating that act. In addition, as other district courts have held, mortgage "foreclosure does not constitute debt collection under the RFDCPA." *Izenberg v. ETS Services, LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008); *see also, Ines v. Countrywide Home Loans*, No. 08cv1267 WQH (NLS), 2008 WL 4791863 *1, *3 (S.D. Cal. Nov. 3, 2008) (while plaintiff contended that defendants failed to comply with plaintiff's lawful demands to validate the debt

pursuant to RFDCPA, the court found that the complaint "[arouse] out of the allegedly unlawful foreclosure on [p]laintiff's property pursuant to a deed of trust, which does not fall within the meaning of the RFDCPA or the [F]FDCPA"). Thus, as a matter of law, Defendant has not violated the RFDCPA.

Plaintiff refers to fraud in her complaint but only in the context of alleging that "defendant is not a person entitled to enforce the alleged DEBT because they lack standing and legal capacity to enforce the instruments." Complaint, ¶ 3. However, though the parties argue over whether Defendant owns the note, the undisputed facts demonstrate that Defendant does indeed have the original note as Defendant was assigned the Deed of Trust and Note from the original lender. Thus, the fraud allegations, as subsumed in the issue of whether Ameriprise has the right to foreclose, are clearly without merit. In addition, Plaintiff's allegations of fraud are rather vague and conclusory and clearly do not meet the pleading requirements of Fed. R. Civ. P. 9(b). Nothing in Plaintiff's opposition to the instant Motion remedies these deficiencies. Plaintiff also makes cursory reference to predatory lending in paragraphs 12 and 13 of her complaint. But again, as with her fraud allegations, it is unclear exactly what unlawful conduct she is charging Defendant with in addition to her allegation that it improperly foreclosed on her property without validating the debt. As a result and as Defendant contends, Plaintiff's brief allegations of predatory lending fail to state a claim as a matter of law.

Plaintiff also cites to California Financial Code §§ 33560 and 22340 and alleges in her first cause of action that Defendant has violated state securities law. Not only are her citations to the financial code puzzling, she has failed to produce any evidence demonstrating a violation of any securities laws despite the close of discovery in this matter. For example, Cal. Fin. Code § 33560 merely provides definitions for that article and does not place affirmative duties on lenders. In addition, Cal. Fin. Code § 22340 allows for the selling of promissory notes to institutional investors; Defendant qualifies as an institutional investor under Section 22340(b)(2). Thus, as a matter of law, Plaintiff has failed to state a claim for state securities law violations.

Furthermore, any claim that Plaintiff and Defendant were in some type of fiduciary

relationship is without merit. *See* Complaint, ¶1. Relationships between a lender and a borrower are not typically treated as fiduciary relationships. "A commercial lender is entitled to pursue its own economic interests in a loan transaction. This right is inconsistent with the obligations of a fiduciary which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for the benefit of another." *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal. App. 3d 1089, 1093 n.1 (1991). As the current lender on the loan, the Court fails to see how the parties are in a fiduciary relationship.

Plaintiff also puzzlingly refers to impossibility of performance in her complaint. *See* Complaint, ¶25. However, the doctrine of impossibility in contract is a defense to an action for breach of contract. *Monroe v. Oakland Unified Sch. Dist.*, 114 Cal. App. 3d 804, 831 (1981). It is not an independent cause of action, and Plaintiff does not adequately demonstrate how it applies to the instant matter.

Finally, Plaintiff's briefing in opposition to the instant motion raises statutory violations no where alleged in her complaint. For example, she charges Defendant with violating the federal Truth in Lending Act and Real Estate Settlement Procedures Act. Not only does Plaintiff's briefing make it unclear how exactly Defendant violated such acts, she cannot oppose the instant Motion based on grounds that are not in issue under the pleadings. "'Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.'" *Wasco Prod., Inc. v. Southwall Tech., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (*quoting Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990). //

IV. Disposition

For the foregoing reasons, the Court hereby GRANTS Defendant's Motion for Summary Judgment as to Plaintiff's entire complaint and LIFTS the Temporary Restraining Order.

IT IS SO ORDERED.

DATED: August 3, 2009

David O. Carter

DAVID O. CARTER
United States District Judge